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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1153

CHARLES SALES CORPORATION, et al.,
Petitioners,

vs.

JAMES G. HODGSKIN, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

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STATEMENT

Respondents, in general, agree with Petitioners' introductory statement and reference to the proceedings below. The Petitioners are CHARLES SALES CORPORATION OF ORLANDO and JOSEPH GORDON. The

respondents are JAMES G. HODGSKIN, also known as J. G. HODGSKIN; THOMAS P. RAUSCH; also known as T. P. RAUSCH; MARGIE M. RAUSCH; AUDREY L. NICHOLS, also known as A. L. NICHOLS; each individually; and JAMES G. HODGSKIN, THOMAS P. RAUSCH and AUDREY L. NICHOLS, d/b/a JATCO COMPANY, a partnership.

RESPONSE TO QUESTION PRESENTED AS TO WHETHER CIVIL PUNITIVE DAMAGES VIOLATE THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION

The petition filed in this cause asserts several times that the amount of punitive damages is left to the discretion of a jury and is "limited by law only to the respective wealth of the defendant." Respondents do not agree with that statement as an abstract proposition, because jury awards of punitive damages are subject to the general propositions of law that they could not stand if the jury was prejudiced or if there was fraud. Further, there are provisions for remittitur in the event of excessive verdict. Such a remittitur was in fact granted in this case as to the punitive damages assessed against one of the petitioners.

Awards of punitive damages in civil cases have been recognized in the common law for well over two hundred years. What appears to be the earliest decision of the United States Supreme Court on the subject is found in the case of *Day v. Woodworth, et al.*, 13 How. 363, 370, 14 L.Ed. 181 (1851) wherein the court stated:

"It is a well established principle of the common law that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured. In many civil actions, such as libel, slander, seduction, etc., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory. In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff which he would have been entitled to recover, had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called 'smart money.' This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must

> depend on the peculiar circumstances of each case. It must be evident, also, that it depends upon the degree of malice, wantonness, oppression, or outrage of the defendant's conduct; the punishment of his delinquency cannot be measured by the expenses of the plaintiff in prosecuting his suit."

Furthermore, in speaking of the question of punitive damages in intentional tort cases, the Supreme Court of the United States in *Lake Shore & M.S.Ry. Co. v. Prentice*, 147 U.S. 101, 13 S.Ct. 261, 37 L.Ed. 97 (1893) held:

> "This question, like others affecting the liability of a railroad corporation as a common carrier of goods or passengers — such as its right to contract for exemption from responsibility for its own negligence, or its liability beyond its own line, or its liability to one of its servants for the act of another person in its employment, — is a question, not of local law, but of general jurisprudence, but which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the several states."

Again, in 1897, the United States Supreme Court, in the combined cases of *Scott v. Donald* and *Gardner v. Donald*, 165 U.S. 58, 17 S.Ct. 265, 41 L.Ed. 632, expressed its approval of punitive damage awards in proper cases and stated:

> "Damages have been defined to be the compensation which the law will award for an injury done, and are said to be exemplary and allowable in excess of the actual loss where a tort is aggra-

> vated by evil motive, actual malice, deliberate violence or oppression. While some courts and text writers have questioned the soundness of this doctrine, it has been accepted in England, in most of the states of this Union, *and has received the sanction of this court.*" (Emphasis added)

The United States Supreme Court once more considered the punitive damage question in 1899 in the case of *Washington Gas-Light Co. v. Lansden*, 172 U.S. 534, 19 S.Ct. 296, 43 L.Ed. 543, and stated:

> "Punitive damages are damages beyond and above the amount which a plaintiff has really suffered, and they are awarded upon the theory that they are a punishment to the defendant, and not a mere matter of compensation for injuries sustained by plaintiff."

This Honorable Court in 1927 upheld the constitutionality of an Alabama statute, the effect of which was to impose *vicarious* liability for compensatory and punitive damages upon employers for injuries inflicted upon their employees by fellow employees where only simple negligence was involved. (See *Louis Pizitz Dry Goods Co., Inc. v. Yeldell*, 274 U.S. 112, 47 S.Ct. 509, 71 L.Ed. 952, 51 A.L.R. 1376). In the last mentioned case, the attack upon the statute was that it violated the Fourteenth Amendment of the United States Constitution.

Finally, in the opinion in the combined cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094, just decided by this Honorable Court in 1967, the majority affirmed the practice of assessing punitive damages in civil cases and stated:

"We come finally to Curtis' contention that whether or not it can be required to compensate Butts for any injury it may have caused him, it cannot be subjected to an assessment for punitive damages limited only by the 'enlightened conscience' of the community. *Curtis recognizes that the Constitution presents no general bar to the assessment of punitive damages in a civil case,* Day v. Woodworth, 13 How. 363, 370-371, 14 L.Ed. 181, but contends that an unlimited punitive award against a magazine publisher constitutes an effective prior restraint by giving the jury the power to destroy the publisher's business. We cannot accept this reasoning. Publishers like Curtis engage in a wide variety of activities which may lead to tort suits where punitive damages are a possibility. To exempt a publisher, because of the nature of his calling, from an imposition generally exacted from other members of the community, would be to extend a protection not required by the constitutional guarantee. Associated Press v. National Labor Relations Board, 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953. We think the constitutional guarantee of freedom of speech and press is adequately served by judicial control over excessive jury verdicts . . . and by the general rule that a verdict based on jury prejudice cannot be sustained even when punitive damages are warranted.

* * *

> "We hold, therefore, that misconduct sufficient to justify the award of compensatory damages also justifies the imposition of a punitive award, subject of course to the limitation that such award is not demonstrated to be founded on the mere prejudice of the jury." (Emphasis added).

Thus it is clear that the United States Supreme Court has recognized and approved civil punitive damage awards in proper cases for over one hundred years and that such awards were recognized in the English common law even long before that.

Likewise, the courts of Florida have given recognition to such awards. The landmark case in Florida on the question appears to have been the 1936 Florida Supreme Court decision of *Winn & Lovett Grocery Co. v. Archer*, 126 Fla. 308, 171 So. 214, 221, wherein the court held:

> "Exemplary damages are given solely as a punishment where torts are committed with fraud, actual malice, or deliberate violence or oppression, or when the defendant acts willfully or with such gross negligence as to indicate a wanton disregard of the rights of others. Exemplary or punitive damages are therefore damages ultra compensation, and are authorized to be inflicted when the wrong done partakes of a criminal character, though not punishable as an offense against the state, or consists of aggravated misconduct or a lawless act resulting in injury to plaintiff when sought to be redressed by a civil action for the tort."

The above quote from *Winn & Lovett v. Archer* was requoted with approval in the 1969 Florida case of *Bank of Miami v. Tambourine* (Fla.App. 1969), 218 So.2d 507.

Likewise, the recent Florida case of *Mendoza v. Farrell* (Fla.App. 1967), 199 So.2d 750, 752, held:

> "Punitive damages may be recovered for a trespass and for an assault, against one who in the performance thereof has acted with malice, moral turpitude, wantonness, willfulness or reckless indifference to the rights of others."

In *Winn & Lovett Grocery Co. v. Archer*, supra, the court pointed out with respect to punitive damage awards in Florida that:

> ". . . they are peculiarly left to the discretion of the jury as the degree of punishment to be inflicted must always be dependent on the circumstances of each case, as well as upon the demonstrated degree of malice, wantonness, oppression, or outrage found by the jury from the evidence."

Punitive damage awards have also been approved in the following recent Florida cases: *Fisher v. City of Miami* (Supreme Court of Florida, 1965), 172 So.2d 455; *Lewis v. Moody* (Fla.App. 1967), 195 So.2d 260, and *Lindgren Plumbing Company, Inc. v. Doral Country Club, Inc.* (Fla.App. 1967), 196 So.2d 242. (This last cited case was one involving a conversion of personal property as is the case at bar).

CONCLUSION

It is respectfully submitted that there is abundant authority for awarding punitive damages in proper cases under Florida jurisprudence and that the common law in that respect has been recognized and approved by this Honorable Court uninterrupted and on several occasions for over one hundred years.

It is further respectfully submitted that petitioners have given no compelling reason for upsetting those decisions (other than the reason inherent in their petition that they would like to be relieved of the responsibility to pay imposed upon them by a jury which heard the facts).

Finally, we respectfully submit that the petitioners, having carried this case through trial in the circuit court and appeal in the District Court of Appeal and having petitioned the Supreme Court of Florida for a writ of certiorari and having now petitioned this Honorable Court for such a writ, have caused a delay of almost two years since trial of the case, with a full knowledge of the long-standing approval of punitive damage awards by the overwhelming majority of courts in this country.

Respondents would request that the court not only deny the petition for writ of certiorari but that respondents be given costs, interest and special damages for delay as is permitted within this court's discretion, by Subsection 4 of Rule 56 of the United States Supreme Court Rules, which provides:

"4. Where a petition for writ of certiorari has been filed, and there appears to be no ground for granting such a writ, the court may, in appropriate cases, adjudge to the respondent reasonable damages for his delay."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by prepaid United States Mail to MILTON A. FRIED, ESQ., Attorney for Petitioners, 47 Northwest 21st Street, Miami, Florida 33137; Clerk; District Court of Appeal, Fourth District, Post Office Box "A", West Palm Beach, Florida 33402; and Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, this 19 day of January, 1971.

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CERTIORARI

DENIED